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Supreme Court of the United States

October Term, 1974

No. 74-775

THE CITY OF NEW ORLEANS AND HONORABLE MOON LANDRIEU,

Appellant,

versus

NANCY DUKES, d/b/a LOUISIANA CONCESSIONS,

Appellee.

Appeal from the United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

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Appeal from the United States Court of Appeals For The Fifth Circuit

JURISDICTIONAL STATEMENT

STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement in support of its contention that the Supreme Court of the United States has jurisdiction on a direct appeal to review the judgment in question, and should exercise such jurisdiction in this case.

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit filed its written opinion on September 27, 1974, which is not yet reported. A copy of the opinion is attached to this jurisdictional statement as Appendix A.

The appeal herein is from a final judgment handed down by the United States Court of Appeals for the Fifth Circuit on September 27, 1974, which held that:

> "Nancy Dukes has overcome the presumption of constitutionality of the New Orleans ordinance's 'grandfather clause' by demonstrating the insubstantiality of the relation between the nature of the discrimination and the legitimate governmental interest in conserving the traditional aspects of the Vieux Carre . . . It is enough that the sum of the constitutional considerations examined outweighs the legislative presumption, so that we are not driven to balance each individual factor."

The court further held the ordinance "unconstitutional as applied" and reversed a summary judgment which had been entered for appellant in the instant matter.

The Supreme Court of the United States has jurisdiction to review by direct appeal the opinion complained of by virtue of 28 U.S.C. §1254 (2).

The following decisions sustain the jurisdiction of this Court to review the opinion on direct appeal in this case. *United Gas Pipe Line Company v. Ideal Cement Company*, 369 U. S. 134 (1961); *Watson v. Employers Liability Assurance Corp.*, 348 U. S. 66 (1954), *rehearing denied* 348 U. S. 921 (1954).

The municipal ordinance of the City of New Orleans declared unconstitutional by the Fifth Circuit Court of Appeals provides:

> Vendors who have continuously operated the same business within that area under the authority of this chapter for eight (8) or more years prior to January 1, 1972 may obtain a valid permit to operate such business within that area.

The United States Court of Appeals for the Fifth Circuit held that the "grandfather clause" of the questioned ordinance in its application to sidewalk hot dog vendors could not withstand an attack under the Equal Protection Clause of the Constitution, under the decisions of this court in *Morey v. Doud*, 354 U. S. 464, 77 S. Ct. 1344 (1957), and *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U. S. 459, 57 S. Ct. 838 (1937).

QUESTIONS PRESENTED

The Court Of Appeals For The Fifth Circuit Erred:

I. IN FAILING TO RECOGNIZE THAT THE FRENCH QUARTER (VIEUX CARRE), THE HEART OF TOURISM IN THE CITY OF NEW ORLEANS, MUST, OF NECESSITY BE HIGHLY REGULATED IN ORDER TO MAINTAIN ITS DISTINCTIVE CHARM AND BEAUTY;

AS ANY ADVERSE EFFECT ON ITS HISTORIC CHARACTER SEVERELY JEOPARDIZES THE ECONOMIC WELL-BEING OF THE ENTIRE CITY AND THEREFORE THE ORDINANCE IS DESERVING OF A MUCH MORE LIBERAL INTERPRETATION THAN THAT HANDED DOWN BY THE FIFTH CIRCUIT COURT OF APPEAL.

II. IN HOLDING AND CONCLUDING THAT THE PRESENT POSTURE OF THE MUNICIPAL ORDINANCES WAS VIOLATIVE OF EQUAL PROTECTION PRINCIPLES.

III. IN HOLDING AND CONCLUDING THAT THE RATIONALE OF THE NEW ORLEANS CITY COUNCIL IN ADOPTING THE QUESTIONED ORDINANCES WAS INSUFFICIENT TO SUPPORT THE DISCRIMINATION THEREBY IMPOSED.

IV. IN HOLDING AND CONCLUDING THAT NANCY DUKES HAD OVERCOME THE PRESUMPTION OF CONSTITUTIONALITY OF THE NEW ORLEANS ORDINANCE'S "GRANDFATHER CLAUSE" BY DEMONSTRATING THE INSUBSTANTIALITY OF THE RELATION BETWEEN THE NATURE OF THE DISCRIMINATION AND THE LEGITIMATE GOVERNMENTAL IN-

TEREST IN CONSERVING TRADITIONAL ASPECTS OF THE VIEUX CARRE.

V. IN HOLDING AND CONCLUDING THAT IN THEIR PRESENT POSTURE THE QUESTIONED ORDINANCES WERE UNCONSTITUTIONAL AS APPLIED.

STATEMENT OF THE CASE

Plaintiff Nancy Dukes brought this action against the City of New Orleans and the Honorable Mayor Moon Landrieu alleging a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

Before January 1, 1972, Dukes was in the business of selling food, drinks, confections, and novelties from push carts throughout the City of New Orleans. Subsequently the New Orleans City Council revised its ordinances, removing hot dog vendors from the list of specifically permitted pushcart enterprises in the Vieux Carre, but simultaneously allowing all licensed vendors who had continuously operated the same such licensed business in the Quarter for eight years prior to January 1, 1972, to continue selling. Since Dukes' operation was only a year old, the effect of this revision was to eliminate her from the Vieux Carre market, but left the remainder of the city open to her. On January 17, 1972, one of Dukes' employees was arrested for violating New Orleans City Ordinance 828 M.C.S. 46-1.1 As a result of this arrest, Dukes initiated a Civil Suit in the United States District Court for the

Eastern District of Louisiana, New Orleans Division on August 1, 1972, seeking declaratory and injunctive relief against defendants alleging that 46-1 and 46-1.1 were arbitrary, unreasonable and denied her due process and equal protection as guaranteed by the United States Constitution.

As there was no factual dispute to be resolved, cross motions for summary judgment were filed by both parties and after argument the Honorable Judge Jack Gordon granted defendant's motion, denied plaintiff's motion and dismissed the suit.

From that judgment plaintiff appealed to the United States Court of Appeals, Fifth Circuit. Said Honorable Court concluded that, under the guiding principles of *Morey v. Doud*, 354 U. S. 457, 77 S. Ct. 1344 (1957), the ordinances in question as applied to Nancy Dukes deprived her of equal protection of the laws. The Court reversed and remanded the judgment appealed from, holding that the classificatory ordinances were not rationally guided and could not withstand constitutional attack.

THE QUESTIONS SUBMITTED ARE SUBSTANTIAL

The Fifth Circuit Court of Appeals has held the questioned ordinance(s) "unconstitutional as applied." The judgment of the Court of Appeals is the proper subject of this appeal. Under 28 U.S.C. § 1254 (2) there is specific provision for appeals where an appellate court has held a state statute to be repugnant to the constitution, laws, or treaties of the United States. For the purposes of this provision, a "state statute" includes a

municipal ordinance. See *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U. S. 134, 82 S. Ct. 676, 7 L.Ed.2d 623 (1962). This Court has held that an appeal under this statute may only be taken from a final judgment, although the statute does not so require and finality is not required for review of other decisions of the Courts of Appeals. This seems a doubtful limitation, and the decisions so holding are arguably no longer authoritative. In a more recent case this court expressly asked for argument on that point, but avoided deciding it when it found that the judgment in the case before it was actually a final judgment. *City of Chicago v. Atchison, T. & S. F. Ry. Co.*, 357 U. S. 77, 78 S. Ct. 1063, 2 L.Ed.2d 1174 (1958). This same question was also left open in *City of El Paso v. Simmons*, 379 U. S. 497, 85 S. Ct. 577, 13 L.Ed.2d 446 (1965). Alternatively, the decision of the Fifth Circuit was a final decision, in that the District Court on remand only has to determine whether the questioned grandfather clause "was severable from the ordinance's simultaneous general preclusion of pushcart hot dog vendors from the Quarter, that is, whether the ordinance should be read as a total nullity, or whether it should be read to preclude the operation of all pushcart hot dog dealers in the Vieux Carre." In either case the Court of Appeals did *finally determine* that the grandfather clause was unconstitutional.

I.

ARE 828 MCS 46-1 AND 46-1.1 UNCONSTITUTIONAL?

Article XIV Section 22 of the Constitution of the State of Louisiana provides, in pertinent part:

"§22. New Orleans; election of officers; form of government; powers; *home rule charters*

Section 22. The electors of the City of New Orleans and of any political corporation which may be established within the territory now, or which may hereafter be embraced within the corporate limits of said city, shall have the right to choose their public officers, and the form of government of said city.

Subject to the limitations elsewhere contained in this Constitution, *the City of New Orleans is hereby declared to have a home rule charter.*

The City of New Orleans, in addition to the powers expressly conferred upon it by Act 159 of 1912, as amended through the Regular Legislative Session of 1950, shall have the right and authority to adopt and enforce local police, sanitary and similar *regulations* and *to do and perform all of the acts pertaining to its local affairs, property* and government, which are necessary or proper in the legitimate exercise of its corporate powers and municipal functions."

Chapter 8 of Article V of the Home Rule Charter, entitled "The Vieux Carre Commission" states the powers of the City Council in maintaining the charm, character and economic viability of the Vieux Carre as follows:

"Section 5-803 Enforcement. The Council shall by ordinance or otherwise carry into effect provisions of the Constitution relative to the

Vieux Carre Section and shall provide for the enforcement of such provisions by appropriate legal proceedings including resort to injunctive process."

The question now becomes whether or not 828 MCS 46-1 and 46-1.1 are able to withstand plaintiff's attack on their constitutionality as a violation of the "Due Process" and "Equal Protection" clauses of the Fourteenth Amendment to the United States Constitution.

A. Are All Types Of Discrimination Prevented By The Due Process And Equal Protection Clauses?

In the well known case of *Oregon v. Mitchell,* 400 U. S. 112, 125, 91 S. Ct. 260, 265 (1970) the United States Supreme Court said of discriminatory laws:

"It cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection."

This is an indication that the Fourteenth Amendment is not to be interpreted as an overall prohibition against any and all types of discriminatory classification or treatment under state law. In *Lehnhouser v. Lake Shore Auto Parts Co.,* 93 S. Ct. 1001 (1973) the Court stated that the:

> "Equal protection clause does not mean that a state may not draw lines that treat one class of individuals or entities different from the others, and the test is whether the difference in treatment is an invidious discrimination."

Accord: *League of Academic Women v. Regents of University of California*, 343 F. Supp. 636 (N.D. Cal. 1973) where it was held that:

> "It is a far different thing to say that a statute extends a right to one group while denying it to another, than it is to say that a statute provides the same rights to everyone, but does not extend an additional right to any of them . . . The Fourteenth Amendment is not a mandate that every statute must be read to outlaw all forms of discrimination."

These cases represent only a small sample of a long line of jurisprudence upholding differences in statutory classification. They exemplify the fact that society today still provides for and maintains certain forms of necessary discrimination. By these statutory classifications the state is attempting to achieve and maintain the general welfare of its citizens. Society's interests are weighed against the rights of particular individuals. There exists a compelling societal interest in these types of cases that predominates over individual rights and privileges.

This is precisely the issue involved in the case at bar. The interests of the City of New Orleans and the State of Louisiana are vitally affected by that section of the City known as the Vieux Carre. The economic welfare of the

City of New Orleans rests on this specially designated area. It is the heart of the City's tourist industry. The incalculable value of this tourist trade prompted the City Council to adopt ordinances to preserve the integrity and to insure the economic viability of the area in a way most conducive to both tourist and citizen alike. This then is the compelling interest of the city which necessitated the enactment of the ordinance in question. No tourist or citizen appreciates peddlers or hawkers interferring with their rights to observe and enjoy the charm and beauty of the New Orleans Vieux Carre. Equal protection does not require that statutes never distinguish between citizens but only that distinctions that are made not be arbitrary or invidious.

In perhaps the landmark case in this area this Court held:

> "The Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the State's objective . . . *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.*" *McGowan vs. Maryland*, 366 U.S. 420, 81 S. Ct. 1101 (1961).

We reiterate the fact that the City of New Orleans has a valid compelling interest in protecting and preserving the Vieux Carre both as a valuable and productive tourist attraction as well as a beautiful and natural respite for its

citizens to enjoy. This protection and preservation is impeded by the indiscriminate allowance of peddlers and hawkers to confront tourists and citizens. The fact that some peddlers are allowed to peddle and not the plaintiff in this action only tends to demonstrate the City Council's interest in keeping the Vieux Carre the tourist attraction it has always been. The Council sought to allow only those peddlers to remain who have over a long period of time become a *part* of the unique charm and beauty that is characteristic of the Vieux Carre.

Lucky Dogs, Inc., in whose favor the questioned ordinances allegedly produced a monopoly has been operating its same business in the Vieux Carre for over twenty years. It has been and still is selling hot dogs from distinctive little carts, which are actually enlarged model versions of the product itself. Tourists, and citizens alike, for years have seen these carts spotted throughout the French Quarter, as a pleasant nostalgic reminder of their visit to the French Quarter, and often seek them out to photograph. The Fifth Circuit itself noted that the City might regulate the appearance of the pushcarts to satisfy the same concerns that prompted the ordinance. These quaint little carts, over the years have become as common a sight in the Vieux Carre as horse drawn carriages. They form an integral part of the atmosphere which makes the French Quarter the focal point of tourism in the City of New Orleans. Appellants respectfully reiterate the fact that the City most definitely has a compelling interest in maintaining the economic viability of this area, and in protecting it from the eroding effects which indiscriminate allowance of peddlers and hawkers would involve.

In the recent case of *Frontiers v. Richardson*, 411 U. S. 677, 93 S. Ct. 1764 (1973) the Court flatly stated:

> "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."

Accord: *Jefferson v. Hackney*, 406 U. S. 535, 546, 92 S. Ct. 1724, 1731 (1972); *Richardson v. Belcher*, 404 U. S. 78, 81, 92 S. Ct. 254, 257 (1971); *Fleming v. Nestor*, 363 U. S. 603, 611, 80 S. Ct. 1367, 1372 (1960); *McGowan v. Maryland*, supra; *Dandridge v. Williams*, 397 U. S. 471, 485, 90 S. Ct. 1153, 1161 (1970); *McDonald v. Board of Election Com'rs of Chicago*, 394 U. S. 802, 89 S. Ct. 1404 (1969); *U.S. Department of Agriculture v. Moreno*, 93 S. Ct. 2821 (1973).

In the *McDonald* case cited supra and also in the case of *Reed v. Reed*, 404 U. S. 71, 92 S. Ct. 251 (1971) the Supreme Court again emphasized the fact that it did allow certain discriminatory statutory law:

> "The Equal protection clause of the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways; the clause does, however, deny the states the power to legislate that different treatment be accorded to persons or places by statute into different classes on basis of criteria wholly unrelated to the objective of that statute."

See also: *Eisenstadt v. Baird*, 405 U. S. 438, 92 S. Ct. 1029 (1972).

The court went on in *Reed* to say that:

> "In order not to violate the equal protection clause a statutory classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Applying these standards to the issue at bar defendants show that the ordinance in question is not violative of constitutional mandates in that it is patently reasonable and not arbitrary since its exclusion of certain peddlers is based on fair criteria that attempts to maintain the traditional atmosphere of the Vieux Carre which is so vitally necessary for its economic viability and the benefits derived by all citizens of New Orleans therefrom. This clearly is a compelling and valid objective.

See: *Turner v. Fouche*, 396 U. S. 346, 90 S. Ct. 532 (1970) where it was held that:

> "The traditional test for denial of equal protection is whether the challenged classification rests on grounds wholly irrelevant to the achievement of valid state objectives."

and: *Police Department of City of Chicago v. Mosley*, 408 U. S. 92, 92 S. Ct. 2286 (1972) in which the court succinctly stated:

> "Crucial in equal protection cases is whether

> there is an appropriate governmental interest suitably furthered by the differential treatment."

It is patently obvious that the economic viability of an area of a city is a valid and compelling purpose that should merit the government's protection through legislation; and, if this area of the city also is vitally important in maintaining the overall economic well-being of the entire city, as is the Vieux Carre, then the interest in closely legislating and protecting the viability of the area is even more compelling. It is only invidious, unnecessary, and totally arbitrary classifications and treatment that the spirit and the letter of the Fourteenth Amendment prohibit. A classification or a statute having some reasonable basis does not offend the Constitution merely because it is not made with mathematical nicety, or the practice results in some inequality. The city should not be caused to lose its entire remedial scheme merely because it failed to cover every peddler at one time. It has been held that:

> "If the classification . . . is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as over-breadth, it will be upheld . . ." *Boroas v. Village of Belle Terre*, 476 F.2d 806 (2nd Cir. 1973)

Accord: *Godwin v. Patterson*, 363 F. Supp. 238 (M.D. Ala. N.D., 1973).

As this Court stated in *Norvell v. State of Illinois*, 373 U. S. 420, 83 S. Ct. 1366 (1963):

> "Exact equality is no prerequisite of equal protec-

tion of the laws within the meaning of the Fourteenth Amendment . . . *The rough accommodations made by government do not violate the equal protection clause unless the lines drawn are hostile and invidious.*"

and in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 93 S. Ct. 1224 (1973):

> "The equal protection clause does not make every minor difference in the application of laws to different groups a violation of our Constitution."

B. Does The Fourteenth Amendment Protect Plaintiff's Economic Interests?

This Court in the case of *Weber v. Aetna Casualty and Sur. Co.*, 406 U. S. 164, 92 S. Ct. 1400 (1972) stated that:

> "The essential inquiry . . . [in determining the validity of a state statute under the equal protection clause] . . . is a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"

Also in the case of *Kramer v. Union Free School District No. 15*, 395 U. S. 621, 89 S. Ct. 1886 (1969), this Court held:

> "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the

> law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."

Accord: *Williams v. Rhodes*, 393 U. S. 23,30, 89 S. Ct. 5, 10 (1968).

The case at bar necessarily involves a weighing process concerning the interests of the City of New Orleans and those of the plaintiff, Nancy Dukes. As we have previously shown, the ordinance in question is attempting to protect the charm, beauty and tradition that are so vitally necessary for the economic productivity of an entire area of the City as well as that of the City itself. To this end the City has a valid and compelling interest in preventing the enjoyment of this area by tourists and citizens alike from being hindered and lessened by the intervention of innumerable peddlers and hawkers physically soliciting and bothering them so as to lessen their enjoyment of the Vieux Carre. Plaintiff is attempting to protect an alleged right to sell her goods in the Vieux Carre from interference by the City. It is most vehemently argued that while plaintiff is free to sell her wares anywhere else in the entire City, the prevention of their sales in the Vieux Carre does not endanger or invade any fundamental personal right possessed by the Plaintiff. Rather, her right to sell food, soft drinks and confections in the Vieux Carre must be balanced against the City's compelling interest in preserving this area for its very economic well-being; for if both citizens and tourists alike are bothered to the extent that they cease to frequent the Vieux Carre then the economic stability of the entire city will be in severe jeopardy.

In the case of *Levy v. Louisiana*, 391 U. S. 68, 88 S. Ct. 1509 (1968), this Court held that:

> "In applying the equal protection clause to social and *economic* legislation, we give great latitude to the legislature in making classifications."

And even more succinctly in *Palmer v. Thompson*, 403 U. S. 217, 91 S. Ct. 1940 (1969) the Court held:

> "The right to equal protection does not promise or guarantee economic or financial equality."

Likewise in the case of *San Antonio Independent School District v. Rodriquez*, 411 U. S. 1, 93 S. Ct. 1278 (1973) the Court said:

> ". . . at least where wealth is involved the Equal Protection Clause does not require absolute equality or precisely equal advantages."

In the case of *In Re Hoover*, 447 F.2d 195 (5th Cir. 1971) a Louisiana statute affording preferential treatment of sellers of goods sold in the state over sellers of goods sold outside the state was held not so unreasonable and arbitrary as to be invidiously discriminating and violative of the equal protection clause.

These cases lend credence to the assertion that the spirit of the Fourteenth Amendment is designed to protect the more fundamental and personal rights from invidious discrimination or interference by state or municipal statutory law.

It is patently obvious that merely because an individual may be at some economic disadvantage this does not automatically make him the victim of an arbitrary, unreasonable and invidious discrimination which is violative of the equal protection clause, particularly where the state demonstrates a necessary and compelling interest necessitating the legislation.

One final point mentioned in *McGowan*, supra, is that the equal protection clause relates to equality between *persons* as such, rather than between areas and therefore territorial uniformity is not a constitutional prerequisite within the ambit of the equal protection clause of the Fourteenth Amendment.

It is respectfully submitted that this is precisely the point in the instant matter for all Dukes is asserting is that she cannot go into the Vieux Carre and sell her food, soft-drinks and confections from pushcarts while she *can* ply her trade in the rest of the city. This is no equal protection argument at all particularly in view of *McGowan* and the fact that she is advancing a territorial argument and *not* a personal argument and particularly in view of the fact that in her brief to the 5th Cir. Court of Appeals, she is apparently now seeking only to sell hot dogs and therefore has abandoned her previous argument that there is an inequality between her and the *persons* who validly come under 828 MCS 46-1 and 46-1.1.

C. Are All Legislative Monopolies Unlawful

The Court of Appeals in its decision states that:

> "Of course it is true that not every statute

> treating uniquely some individual enterprise or some closed class of enterprises is constitutionally objected. Nevertheless, the creation of a protected monopoly for the favored class member is a significant factor to be considered in assessing the nature of the discrimination here."

Such a concept is precisely the point. The fact that only Lucky Dogs, Inc. qualified under the ordinance is expressive of the intent of the New Orleans City Council in enacting such ordinances dealing exclusively with the French Quarter. This section of the City is afforded special treatment in the City's Municipal Code. The alleged monopoly in the case at bar was incidentally created by the city in its effort to maintain, as is, its main tourist attraction. The questioned grandfather clause is illustrative of the desire, not to favor particular businesses, but to maintain only those features which over the years, over a score of years in this case, have become landmarks in this area of the City of New Orleans. It is an entire area of the City which is intentionally preserved, and not individual establishments. Such intent should be viewed in its entirety, and not dissected into each of its incidental side efforts. We urge this Honorable Court, therefore, to consider that such action on the part of the City of New Orleans represents a legitimate and compelling governmental interest in that the economic well-being of an entire city largely hinges on revenues derived from tourism generated in this distinctive area.

Consequently, based on appellants' assertion that the ordinances questioned in the case at hand represent legitimate governmental and legislative activity, any incidental adverse effects created thereby are outweighed

by compelling state interests and therefore not objectionable. More specifically, the alleged monopoly found by the Court of Appeals to have been created by the ordinances, was the result of valid and compelling legislative activity, and therefore not prohibited.

Similar monopolies legislatively created because of valid governmental interests have been upheld. In the case of *Ladue Local Lines, Inc. v. Bi-State Development Agency of The Missouri-Illinois Metropolitan District,* 433 F.2d 131 (1970) it was stated:

> "We deem it well settled that when a state announces a public policy against free competition in an industry essential to it, state control and regulation of that industry, even to the extent of eliminating competition, is permissible."

Also in the case of *Nebbia v. New York,* 291 U. S. 502, 529-530, 538, 54 S. Ct. 505, 512-513, 516, 78 L.Ed. 940 (1934) it was held:

> "The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees. Moreover, the state or a municipality may itself enter into business in competition with private proprietors, and thus effectively although indirectly control the prices charged by them.

> "If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public."

Accord: *Heath v. Aspen Skiing Corporation*, 325 F. Supp. 223 (1971); *Sun Valley Disposal Co. v. Silver State Taxicab Operators' Ass'n. v. Yellow Cab Co.*, 278 F. Supp. 979 (1968).

CONCLUSION

It is respectfully submitted, that the decision of the Fifth Circuit, in holding that the rationale behind the questioned ordinances was insufficient to withstand attack, was erroneous in that said rationale represented a compelling governmental interest on the part of the city of New Orleans. This decision has wide ramifications, in that it could affect all alleged monopolies legislatively created in the public interest. Any governmental activity which resulted in such territorial discrimination could be challenged under this decision. We believe that the questions submitted are truly substantial and represent

to this Court far reaching issues of the most vital public importance that must be answered.

Respectfully submitted,

Joel P. Loeffelholz
Assistant City Attorney
Attorney for Appellant

Blake G. Arata
City Attorney

CERTIFICATE

The undersigned hereby certifies that a true and correct copy of the above and foregoing has been served on counsel of record by depositing same in the United States mail, postage prepaid, properly addressed this ____ day of December, 1974.

APPENDIX A

CHAPTER 46

PERMITS[1]

Section 46-1. Permits required for various callings or occasions; schedule of fees therefor.[2]

Every person who shall desire to use the public streets, sidewalks or public places or private places or business establishments for the conduct of any of the businesses or callings hereinafter set forth or to hold meetings or rallies or public entertainments in private or public halls or places shall first apply to and obtain from the Department of Finance a permit. Such permit shall in each instance state the occasion for which it is issued and the date upon which it will expire and shall be in addition to any other tax or license to which permittee may be liable. Such permits, however are not valid within the Central Business District area bounded by the River on the East, Claiborne Avenue on the West, Esplanade Avenue on the North and Howard Avenue on the South, except as provided in Section 46-1.1 of this chapter. Such permits shall be paid for by the applicant at the time of issuance according to the following schedule:

(1) A. Definitions:

1. "Mardi Gras Season" is defined as those days and nights commencing eleven (11) days before Mardi Gras and continuing until midnight on Mardi Gras day.

2. "Parade Route" is defined as that area extending one (1) city block in either direction of the streets used by the various parades while the parade is in progress.

3. "Parade Time" is defined as that time commencing two (2) hours before the starting time of a parade and ending two (2) hours after the passing of a parade, but no vendor shall sell or display his wares within the Central Business

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1. For charter provisions with respect to permits, including a definition of "permit" as there used, see Char., §§ 4-701 and 4-702. For provisions requiring a permit for engaging in various occupations or undertakings dealt with in the other chapters hereof, see those chapters.

2. For licenses on other coin operated machines, see Chapter 16, Coin Operated Machines.

District which is defined as the area bounded by the River, Esplanade Avenue, Claiborne Avenue and Howard Avenue, prior to 6:00 p.m. on weekdays, except Mardi Gras Day. On weekends and on Mardi Gras Day when there is more than one parade on any calendar day the vendor must move two (2) hours after the end of the last parade for that calendar day.

4. "Vehicle" is defined as a conveyance which is licensed by the Motor Vehicle Division of the Louisiana State Department of Safety.

B. To sell the following items on city streets along the designated "parade route" during Mardi Gras Season:

1. For a fixed location:

(a) To Sell

(1) Sandwiches, cooked foods and drinks (other than alcoholic beverages) $50.00
(2) Candy, nuts and confections 50.00
(3) Novelties 50.00

(b) There shall be a $50.00 deposit on each permit to guarantee payment of sales tax at the end of the Mardi Gras Season. This deposit will be forfeited thirty (30) days after Mardi Gras if taxpayer has not filed his sales tax return. This provision shall not restrict the authority of the Director of Finance to assess and collect sales tax and use tax in accordance with Chapter 56 of Ordinance #828, M.C.S., Code of the City of New Orleans.

(c) A specific location can be assigned but not guaranteed by the City.

(d) Vendors at fixed locations on public streets, may set up their vehicles during "parade time" only.

(e) When the use of a fixed location would interfere with a parade along a particular route or interfere with public safety, the

City shall have the option to deny the use of such location for such period of time as may be necessary.

(f) Vendors selling from fixed locations shall comply with all provisions of Chapter 38 of Ordinance #828, M.C.S., Code of the City of New Orleans, relative to traffic regulations, especially, but not exclusively with regard to distances from fire hydrants and intersections.

(g) The trailer, van and any appendant thereto from which a vendor sells shall not exceed thirty (30) feet in length or nine (9) feet in width. Vendors must sell and display from a "vehicle"; no stands, card tables or the like shall be allowed on public streets, sidewalks, alleys, parks, squares, neutral grounds or rights-of-way for the sale or display of goods.

(h) All vendors selling from fixed locations shall have the Mayoralty Permit as provided for in this section publicly displayed at his place of business and failure to do so shall constitute a violation of this chapter.

(i) No Mardi Gras Mayoralty Permits shall be issued for vendors from fixed locations on public streets, sidewalks, alleys, parks or squares in the Vieux Carre as defined in Section 65-6 of Ordinance #828, M.C.S., Code of the City of New Orleans.

(j) All applicants for Mardi Gras Mayoralty Permits to sell food and/or drinks on public or private property must show proof of compliance with all regulations and requirements of the City Board of Health and the Department of Fire, Fire Prevention Bureau before permit can be issued.

2. For Moving Locations:

(a) To Sell

(1) Sandwiches, cooked foods and drinks (other than alcoholic beverages) $25.00

(2) Candy, nuts and confections 50.00
(3) Novelties 50.00

(b) There shall be a $25.00 deposit on each permit to guarantee payment of sales tax as provided in Section 56-41, of Ordinance #828, M.C.S., Code of the City of New Orleans, at the end of the Mardi Gras Season. This deposit will be forfeited 30 days after Mardi Gras, if taxpayer has not filed his sales tax return. This provision shall not restrict the authority of the Director of Finance to assess and collect sales and use tax in accordance with Chapter 56 of Ordinance #828, M.C.S., Code of the City of New Orleans.

(c) All moving vendors must keep moving except when making a sale. No stands, card tables or the like, except hand-carried displays shall be allowed on public streets, sidewalks, alleys, parks, squares, neutral grounds or rights-of-way for the sale or display of goods.

(d) For each permit issued one (1) Mardi Gras Mayoralty Badge with a corresponding number shall be purchased by the permittee from the Department of Finance, which badge must be publicly displayed on their person at all times and failure to do so shall constitute a violation of this Chapter.

(e) Mardi Gras Mayoralty Permits for moving locations shall be invalid in the Vieux Carre as defined in Section 65-6 of Ordinance #828, M.C.S., Code of the City of New Orleans.

(f) Mardi Gras Mayoralty Permits for moving locations shall only be valid during "parade time" along designated "parade routes".

(2) To sell novelties on the city streets other than during the Mardi Gras season.
Per sales outlet, for one year ..... $ 25.00

(3) To sell candies, nuts and confections on foot or from push carts or other vehicles on city streets or public places other than during the Mardi Gras season.
Per sales outlet, per year ..... $ 25.00

(4) To sell ice cream, ice cream bars and related confections from push carts or other vehicles on city streets or public places other than during the Mardi Gras season.
Per sales outlet, per year ..... $ 25.00

(5) To sell hot tamales and/or hot dogs on foot or from push carts on city streets or public piaces other than during the Mardi Gras season.
Per sales outlet, per year ..... $ 25.00

(6) To peddle cooked food, cakes, pies, etc., other than during the Mardi Gras season.
Per sales outlet, per year ..... $ 50.00

(7) To sell fruits and vegetables on foot or from push carts on city streets or public places.
Per sales outlet, per year ..... $ 25.00

(8) To sell fruits and vegetables from animal-drawn or motor propelled vehicles.
Per vehicle, per year ..... $ 50.00

(9) To sell home-manufactured articles or home-grown products on foot.
Per year ..... $ 25.00

(10) To paint, exhibit or sell paintings and/or portraits or to exhibit or sell works of art on public property in immediate vicinity of Jackson Square.
Per year ..... $ 40.00

(11) To sell razor blades, toilet articles, pencils, shoe laces, etc., on city streets or public places.
Per year ..... $ 15.00

(12) To sell tickets to supper to be held in private homes.
Per event ..... $ 15.00

(13) Demonstrations of food products or devices in public places or markets, etc.
Per engagement ..... $ 25.00

(14) To distribute samples, canvass on city streets or from house to house.
(a) For crew manager, per year ..... $ 25.00
(b) For each crew member, per year 15.00

(15) To advertise with music, on truck or on foot or in costume or for any other advertising stunt on public property.
(a) Per year $100.00
(b) Per month 15.00

(16) To take and sell photographs on the city streets or other public places where the parties photographed willingly pose for the picture and the picture is developed on the spot where taken and there delivered to the parties photographed.
Per year ..... $ 25.00

(17) To take and sell photographs on city streets or in any other public places in any other manner than that described in the preceding paragraph.
Per year $250.00

(18) To operate a hand organ in the city streets.
Per year ..... $ 15.00

(19) To conduct a sale of goods, wares or merchandise in issuance, bankruptcy, mortgage, insolvent assignees, receivers, trustees removal or closing out sale or sale of goods, wares and merchandise damaged by fire or otherwise in accordance with Section 51:31 to 51:41 of the Revised Statutes of Louisiana.
Per sale ..... $ 25.00

(20) Weighing devices, etc. on sidewalks or in public places.
Per nickel machine, per year ..... $ 25.00
Per penny machine, per year 15.00

(21) Exhibitions, expositions, etc., educational or otherwise, when admission is charged or offerings solicited or accepted.
Per month ..... $ 25.00

(22) For a circus, a carnival or any other activity wherein mechanical devices for amusement other than coin-operated are used on a temporary basis.
Per year in addition to license $100.00

(23) To operate games of sport or skill when admission is charged or a fee collected in any manner, including putt-putt games, shooting galleries, archery, etc.
Per year $100.00

(24) To conduct sport events when admission is charged or a fee collected in any manner and when an annual license is not paid to the city:
(a) Admission not more than 75¢ per event ... $ 15.00
(b) Admission more than 75¢ per event 25.00

(25) For amateur and professional prizefights or boxing and wrestling contests:
(a) Admission not more than 75¢ per event .... $ 15.00
(b) Admission more than 75¢ per event 25.00

(26) For entertainment (other than fairs given by a church for the benefit of the church or by a school for the benefit of the school) dance reviews, plays, festivals, bazaars, etc., with or without music, when admission is charged or when no admission is charged, but subscription fees or contributions are collected.
(a) Admission not more than 75¢ or by invitation
Per event ..... $ 15.00
(b) Admission more than 75¢ per event 25.00

(27) For Carnival Balls ..... $ 25.00

(28) For philharmonic or symphonic recitals, operas or other entertainments of like nature when admission is charged or a fee or subscription is collected in any manner.
(a) Admission not more than 75¢ or by invitation
Per event ..... $ 15.00
(b) Admission more than 75¢ 25.00

(29) For orchestras in restaurants or business establishments for purposes of entertainment or dancing when no admission is charged.
Per year ..... $ 50.00

(30) For music other than an orchestra for entertainment purposes or dancing when no admission is charged or fee exacted.
Per year ..... $ 25.00

(31) For music for entertainment purposes or dancing where admission is charged or fee exacted in any manner.
Per year ..... $ 100.00

(32) For dancing when admission is charged:
(a) Admission not more than 75¢ per event ..... $ 15.00
(b) Admission not more than $1.99 per event ..... $ 25.00
(c) Admission $2.00 or more per event $ 50.00

(33) For a private dance in a public hall.
Per event ..... $ 15.00

(34) To give a rummage sale.
Per event ..... $ 15.00

(35) For any transient vendor, canvasser, solicitor or merchant engaged in the sale at retail of goods, wares and merchandise and who, for the purpose of carrying on such business hires, leases, or occupies, either in whole or in part, a room, or some other temporary quarter a structure for the exhibition and sale of such goods, wares and merchandise and with the intention to close out or discontinue such business within a period of one year from the date of commencement thereof.
Per location, per year ..... $ 250.00

(36) To sell flowers on the city sidewalks or streets.
Per sales outlet, per year ..... $ 50.00

(37)—(40) Reserved.

(41) For the purpose of operating a retail business establishment exhibiting and selling to the public books, magazines, periodicals and other publications or paraphernalia which feature nudity, simulate natural or unnatural sex acts or otherwise appeal to sexually prurient interests and which establishments cater exclusively to adults $10,000.00

(C.C.S., Ord. No. 15,510, § 1; C.C.S., Ord. No. 17,633, § 1; C.C.S., Ord. No. 17,989, § 3; M.C.S., Ord. No. 3027, § 1, 3-4-65; M.C.S., Ord. No. 4346, § 1, 7-16-70; M.C.S., Ord. No. 4359, § 1, 8-6-70; M.C.S., Ord. No. 4360, § 1, 8-6-70; M.C.S., Ord. No. 4439, § 2, 12-18-70; M.C.S., Ord. No. 4555, §§ 1—5, 5-13-71; M.C.S., Ord. No. 4744, §§ 1, 2, 12-8-71; M.C.S., Ord. No. 5085, § 1, 2-15-73; M.C.S., Ord. No. 5086, § 1, 2-15-73.)

Section 46-1.1. Permits valid in the central business district.

Permits designated by the following subsection of Section 46-1: Subsections (1), (10), (12), (19), (21), (24), through and including (36), are valid within that area of the Central Business District bounded by the River on the East, Claiborne Avenue on the West, Esplanade Avenue on the North and Howard Avenue on the South. Vendors who have continuously operated the same business within that area under the authority of this chapter for eight (8) or more years prior to January 1, 1972 may obtain a valid permit to operate such business within that area. (M.C.S., Ord. No. 4744, § 3, 12-8-71; M.C.S., Ord. No. 4822, § 1, 4-13-72; M.C.S., Ord. No. 4957, § 1, 9-21-72; M.C.S., Ord. No. 5087, § 1, 2-15-73.)

APPENDIX B

Nancy DUKES, d/b/a Louisiana Concessions,
Plaintiff-Appellant,

versus

The CITY OF NEW ORLEANS and Honorable Moon Landrieu,
Defendants-Appellees.

No. 73-3979
Summary Calendar.*

United States Court of Appeals
Fifth Circuit.

Sept. 27, 1974.

* * * *

GOLDBERG, Circuit Judge:

Before January, 1972, plaintiff-appellant Nancy Dukes maintained a pushcart business in the Vieux Carre of New Orleans, selling hot dogs, drinks, confections and novelties. Subsequently the New Orleans City Council revised its ordinances, removing hot dog vendors from the list of specifically permitted pushcart enterprises in the Vieux Carre, but simultaneously allowing all licensed

*Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir. 1970, 431 F.2d 409, Part I.

vendors who had continuously operated the same such business in the Quarter for eight years prior to January 1, 1972, to continue selling.[1] Since Dukes' operation was only a year old, the effect of this revision was to eliminate her from the Vieux Carre market. The other pushcart hot dog vendor in the Quarter, eight year veteran Lucky Dogs, Inc., was thus left with an apparently unchallengeable monopoly.

Dukes brought this action under 28 U.S.C. §§ 2201 & 2202 against the City of New Orleans and its Mayor challenging the application of the revised ordinance's "grandfather clause" to hot dog sellers in the Vieux Carre as a denial of Equal Protection and praying for an injunction and declaratory judgment.[2] Both Dukes and the City

1 New Orleans, La., Ordinance 4822, Apr. 13, 1972, amending Ordinance 828 M.C.S. ch. 46. *See also* Ordinance 4957, Sept. 21, 1972, amending Ordinance 828 M.C.S. ch. 46.

2 Dukes began this action against the predecessor version of the New Orleans ordinance regulating peddling on the public streets and sidewalks of the Vieux Carre, New Orleans, La., Ordinances 4744, May 13, 1971; 4555, May 13, 1971; 4439, Dec. 18, 1970, all amending Ordinance 828 M.C.S. ch. 46. That version prohibited most pushcart sales, but excepted from prohibition the vending of certain items including hot dogs. Dukes' other sales items, drinks, confections and novelties were not specifically excepted under the ordinance, however. After the arrest of one of her employees on charges — later dismissed — of violating the existing ordinance, Dukes initiated this suit challenging the ordinance's discrimination between "similar and comparable businesses" as a denial of Equal Protection. After the revision of the ordinance in 1972, she amended her pleadings to attack the "grandfather clause."

Since the current ordinance permits no pushcart foodstuff vendors in the Quarter, *qua* foodstuff vendors, Dukes appears no longer seriously to press her original attack on discriminations between vendors of different types of goods. In any case, we have no difficulty in concluding that such an Equal Protection claim on Dukes' part could not withstand analysis. *See* McGowan v. Maryland, 1961, 366 U.S. 420-426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393-399.

moved for summary judgment on the merits of the Constitutional claim. The district court, ruling on the basis of the pleadings, answers to the plaintiff's interrogatories, and uncontested affidavits, found no genuine issue of material fact and entered judgment for the City as a matter of law.

We conclude that the court below erred in its application of Equal Protection principles, and thus reverse. New Orleans retains ancestral entitlement to regulate business so as to maintain the charms of the Vieux Carre. But the Equal Protection Clause of the Constitution reaches beyond Canal Street, and lays its heavy hand when unjustified discrimination scars the Quarter's complexion. The City's purpose in revising its ordinance, fair though it be, cannot support its favoring a venerable hot dog dealer with the skins of eight seasons over franks of a more recent vintage.

I

There is no question of the City Council's legitimate authority generally to regulate business conducted on the public streets and sidewalks of the Vieux Carre in order to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists. The sole dispute is whether the Council has exceeded Constitutional bounds in its discriminations regarding which enterprises are to be permitted and which are to be prohibited.

The Council's classifications are not drawn upon inherently suspect lines such as race or religion. Nor is the personal interest Dukes seeks to protect here one of such

Constitutional fundamentality as to give rise to a necessity for strict judicial scrutiny in preserving its equal protection. *See, e. g.*, Harper v. Virginia State Bd. of Elections, 1966, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (voting); NAACP v. Button, 1963, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (association); NAACP v. Alabama, 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (access to courts). Rather here

> [we] deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "reasonable, not arbitrary" . . . and bears "a rational relationship to a [permissible] state objective."

Village of Belle Terre v. Boraas, 1974, ___ U.S. ___, 94 S.Ct. 1536, 39 L.Ed.2d 797. Under this test the deference to legislative judgment is strong. *See, e. g.*, San Antonio School District v. Rodriguez, 1973, 411 U.S. 1, 17, 40, 93 S.Ct. 1278, 1288, 1300, 36 L.Ed.2d 16, 33, 47; McGowan v. Maryland, 1961, 366 U.S. 420, 425, 81 S.Ct. 1101, 1104, 6 L.Ed.2d 393, 399; Williamson v. Lee Optical, 1955, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465, 99 L.Ed. 563, 572-573; Railway Express Agency v. New York, 1949, 336 U.S. 106, 109-110, 69 S.Ct. 463, 465, 93 L.Ed. 533, 538-539. As the Supreme Court restated in Morey v. Doud, 1957, 354 U.S. 457, 463-464, 77 S.Ct. 1344, 1348-1349, 1 L.Ed.2d 1485, 1490, our chief guide in resolving this case,

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of

discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Lindsley v. Natural Carbonic Gas Co., [1911,] 220 U.S. 61, 78, 79, 31 S.Ct. 337, 340, 341, 55 L.Ed. 369, 377 . . .

Thus, we view the New Orleans ordinance initially from a traditionally sympathetic perspective. This does not mean, however, that the judicial role of constitutional oversight is to be abdicated. Morey v. Doud also teaches that where the discriminations to be assessed assume an "unusual character," we must exercise "careful consideration to determine whether they are obnoxious" to the Equal Protection Clause. 354 U.S. at 464, 77 S.Ct. at 1349, 1 L.Ed.2d at 1490-1491 (quoting Hartford Steam Boiler Inspec. & Ins. Co. v. Harrison, 1937, 301 U.S. 459, 462, 57 S.Ct. 838, 840, 81 L.Ed. 1223, 1226; Louisville Gas & Elec. Co. v. Coleman, 1928, 277 U.S. 32, 37, 48 S.Ct. 423, 425, 72 L.Ed. 770, 774). Finding the "grandfather clause" of the New Orleans ordinance here at issue to be facially "unusual" in its establishment of a closed class of favored

enterprises distinguished solely by the length of their tenure as established operations, we proceed to such a "careful consideration."

II

In our examination of the nature of the discrimination attacked here, we are guided by two principles consistently reiterated by the Supreme Court. First, "distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved. . . . But distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences.' Hartford S.B.I. Ins. Co. v. Harrison, [1937,] 301 U.S. 459, 463, [57 S.Ct. 838, 840] 81 L.Ed. 1223, 1226." Morey v. Doud, 354 U.S. at 466, 77 S.Ct. at 1350, 1 L.Ed.2d at 1492. Second, "[a] classification . . . 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, [1920,] 253 U.S. 412, 415, [40 S.Ct. 560, 561] 64 L.Ed. 989, 990." Reed v. Reed, 1971, 404 U.S. 71, 75-76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225, 229.

A classification based on tenure may have a legitimate governmental rationale and thus be constitutionally permissible. A zoning ordinance, for example, may be made applicable only to future builders in order to conserve reliance interests. *See* Sampere v. New Orleans, 1928, 166 La. 776, 117 So. 827, aff'd per curiam, 1929, 279 U.S. 812, 49 S.Ct. 262, 73 L.Ed. 971. *Cf.* United States v. Maryland Savings-Share Ins. Corp., 1970, 400 U.S. 4, 91 S.Ct. 16, 27 L.Ed.2d 4. Even a discrimination between established

operations based on distinctions in tenure may be proper if rationally connected to a valid legislative purpose. Thus in Watson v. Maryland, 1910, 218 U.S. 173, 30 S.Ct. 644, 54 L.Ed. 987, the Supreme Court upheld a Maryland statute exempting physicians who had practiced in the state for four years from taking a licensing examination, upon the reasonable legislative "theory that those who have acceptably followed the profession in the community for a period of years may be assured to have the qualifications which others are required to manifest as a result of an examination." 218 U.S. at 177, 30 S.Ct. at 646, 54 L.Ed. at 989. *See also* Dent v. West Virginia, 1889, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623. *Cf.* Eslin v. Collins, Fla.1959, 108 So.2d 889.

The New Orleans ordinance challenged here was enacted as part of a series of measures limiting peddling in the Vieux Carre in accordance with the New Orleans City Council's apparent and reasonable belief that the presence of such distractions inhibits tourism. The Council's asserted purpose in permitting only those vendors who had sustained their operations in the Quarter for eight years to remain was to preserve those least likely to disturb "the unique charm and beauty that is characteristic of the Vieux Carre."[3] While we are sympathetic to New Orleans' efforts to conserve the traditional complexion of the Vieux Carre and sensitive to the difficulty of consistently aligning tradition with purely reasonable distinctions,[4] we nevertheless find the Council's rationale insufficient to support the discrimination imposed.

3 Brief of Appellee at 7.

4 *Cf.* McGowan v. Maryland, 1961, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 399; Kotch v. River Port Pilot Comm'rs, 1947, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093.

The pivotal defect here is akin to that exposed by the Supreme Court in Morey v. Doud, *supra*. Under the Illinois statute invalidated there, the American Express Company was exempted from regulatory and licensing requirements imposed on other issuers of money orders in the state, apparently in recognition of its stability and preeminence. The Supreme Court held this rationale insufficient, however, because American Express would "continue to be unregulated whether or not [it] retains its present characteristics." 354 U.S. at 467, 77 S.Ct. at 1351, 1 L.Ed.2d at 1492. Here similarly, the hypothesis that a present eight year veteran of the pushcart hot dog market in the Vieux Carre will continue to operate in a manner more consistent with the traditions of the Quarter than would any other operator is without foundation.[5] There is simply no suggestion that eight years' experience in the pushcart hot dog business in the Vieux Carre is necessary or helpful to better hot dog salesmanship, or that it instills in the licensed vendors (or their likely transient operators) the kind of appreciation for the conservation of the Quarter's tradition that would move them to refine their methods of operation.[6]

5 The line of analysis we adopt here is not at odds with the principle that in assessing economic legislation under challenge as a denial of Equal Protection, we should assume any reasonable set of facts on which the legislature might have based its judgment. That principle applies only to the assumption of facts in existence at the time of enactment. *See* Lindsley v. Natural Carbonic Gas Co., 1911, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369, 377, quoted in Morey v. Doud, 354 U.S. at 464, 77 S.Ct. at 1349, 1 L.Ed.2d at 1490.

6 Nor does the challenged ordinance require the eight year veterans permitted to remain in the Vieux Carre to maintain the current appearance or location of their equipment or operations, or their habitual ways of doing business.

Furthermore, the New Orleans ordinance selects a single vendor for special perference,[7] closing the Vieux Carre pushcart foodstuff market to all other operators regardless of how well established or desirable their operations may be or might otherwise become. This factor distinguishes the present matter from Stanley v. Public Util. Comm'n, 1935, 295 U.S. 76, 55 S.Ct. 628, 79 L.Ed. 1311, in which the Supreme Court upheld legislation somewhat similar to that challenged here, but which operated only to limit entry into the regulated field to qualifying applicants, not to bar future entry altogether. There, a 1933 Maine statute required common carriers operating motor vehicles for hire to obtain a certificate of public convenience and necessity, but also provided that such certification was to be granted "as a matter of right" to carriers in continuous operation since March 1, 1932. The Supreme Court's opinion went no further than to sanction such a limited qualification on free entry into the market, holding that in the exercise of its legitimate regulatory powers, "the legislature could determine, within reason, as of what period the service of carriers for hire over its highways did not impair their use or cause congestion, and [could] require certificates for those seeking to supply additional transportation for a later period." 295 U.S. at 78, 55 S.Ct. at 628, 79 L.Ed. at 1313. *Cf.* Watson v. Maryland, 1910, 218 U.S. 173, 30 S.Ct. 644, 54 L.Ed. 987.

7 Unlike the statute invalidated in Morey v. Doud, the New Orleans ordinance does not specify th one enterprise given legislative favor, Lucky Dogs, Inc., by name; here the statutory exemption is ostensibly generic. The functional effect of the specific statutory exemption is identical to that encountered in Morey v. Doud, however; it is a matter of public licensing record that Lucky Dogs, Inc., is the only hot dog vendor qualifying under the "grandfather clause" to operate in the Vieux Carre. We see no legal significance in the different manner of describing the single favored entity. *See* Cotting v. Godard, 1901, 183 U.S. 79, 114-115, 22 S.Ct. 30, 44, 46 L.Ed. 92, 109-110, cited with approval in Morey v. Doud, 354 U.S. at 467, 77 S.Ct. at 1351, 1 L.Ed.2d at 1492-1493.

The exclusionary character of the New Orleans ordinance more closely resembles the provisions of the Illinois statute held invalid in Morey v. Doud, *supra*, which imposed economic and organizational burdens,[8] above and beyond the requirement of demonstrating public convenience, on competitors of American Express while exempting American Express alone. Of course it is true that not every statute treating uniquely some individual enterprise[9] or some closed class of enterprises[10] is constitutionally objectionable. Nevertheless, the creation of a protected monopoly for the favored class member is a significant factor to be considered in assessing the nature of the discrimination here. Like Morey v. Doud, "[t]his is not a case in which the Fourteenth Amendment is being invoked to protect a business from the general hazards of competition. The hazards here have their roots in the statutory discrimination." 354 U.S. at 468-469, 77 S.Ct. at 1352, 1 L.Ed.2d at 1493.

We conclude that appellant Dukes has overcome the presumption of constitutionality of the New Orleans ordinance's "grandfather clause" by demonstrating the in-

8 These included preclusion from selling through retail establishments and the imposition of licensing surety and insurance costs.

9 *See, e. g.*, Erb v. Morasch, 1900, 177 U.S. 584, 20 S.Ct. 819, 44 L.Ed. 897 (statute exempting named rail line from compliance with limit on train speed in city).

10 In United States v. Maryland Savings-Share Ins. Corp., 1970, 400 U.S. 4, 91 S.Ct. 16, 27 L.Ed.2d 4, for example, the Supreme Court upheld a 1960 federal statute granting tax exemption to existing non-profit corporations engaged in the insurance of savings and loan associations against the equal protection attack of a like corporation chartered in 1962 and denied the exemption. The Court was at some pains to point out, however, that a legitimate and rationally related governmental interest in not extending the exemption had been "affirmatively" demonstrated. *Id.* at 6, 7 n. 2, 91 S.Ct. at 17, 18, 27 L.Ed.2d at 7, 7 n. 2.

substantiality of the relation between the nature of the discrimination and the legitimate governmental interest in conserving the traditional assets of the Vieux Carre. We need not determine which aspects of the legislative monopoly created here might hypothetically be adjusted to render the ordinance constitutionally inoffensive.[11] It is enough that the sum of the constitutional considerations examined outweighs the legislative presumption, so that we are not driven to balance each individual factor. "Taking all of [the] factors in conjunction — the remote relationship of the statutory classification to the [ordinance's] purpose or to business characteristics, and the creation of a closed class . . . — we hold that the application of the [ordinance] to [appellant] deprives [her] of equal protection of the laws." Morey v. Doud, *supra*, 354 U.S. at 468-469, 77 S.Ct. at 1352, 1 L.Ed.2d at 1493.

We emphasize that our holding does not bar New Orleans from further legitimate attempts to conserve the Vieux Carre's unique resources. The City Fathers might constitutionally enact any of a broad range of measures — for example, strict regulation of the location and appearance of pushcarts — in order to satisfy the same concerns that prompted the ordinance here examined. But such a "grandfather clause" as was enacted could be viable only if paternally genuine; a classificatory statute can withstand constitutional attack only if its classificatory directions are rationally guided. Here the strictly chronological divisions were not. We hold only that the City may not satisfy its proper goals through such arbitrary discriminations.

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11 We likewise specifically decline to consider the constitutionality of the "grandfather clause" as it applies to other categories of enterprise in the Vieux Carre.

Finding the ordinance unconstitutional as applied, we reverse the summary judgment for the City entered below. Since the trial court did not find the ordinance's discrimination unconstitutional, it did not consider whether the "grandfather clause" was severable from the ordinance's simultaneous general preclusion of pushcart hot dog vendors from the Quarter, that is, whether the ordinance should be read as a total nullity, or whether it should be read to preclude the operation of all pushcart hot dog dealers in the Vieux Carre. We remand for the district court to resolve this question and enter judgment accordingly.

Reversed and remanded for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NANCY DUKES, d/b/a Louisiana Concessions
Plaintiff

versus No. 73-3979

THE CITY OF NEW ORLEANS and HONORABLE MOON LANDRIEU
Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the City of New Orleans and the Honorable Moon Landrieu, the defendants above named, hereby appeal to the Supreme Court of the United States from the judgment reversing the United States District Court, Eastern District of Louisiana, New Orleans Division, entered in this action on September 27th, 1974.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

/s/ JOEL P. LOEFFELHOLZ
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